A **DATUK SERI TIONG KING SING**

v.

DATUK SERI ONG TEE KEAT

B HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[SUIT NO: S-23-99-2009]
30 NOVEMBER 2013

C ***CIVIL PROCEDURE:*** *Disclosure - Privilege - Information relating to journalist's source of information - Whether protected from disclosure - Whether journalist may be ordered to disclose source of information - Criteria to be satisfied for ordering disclosure*

D ***EVIDENCE:*** *Privilege - Information relating to journalist's source of information - Whether protected from disclosure - Whether journalist may be ordered to disclose source of information - Criteria to be satisfied for ordering disclosure*

E The plaintiff's claim against the defendants was in relation to defamatory statements published in the Sunday Times ('the article'). The third defendant was Joseph, the author of the article. During the course of his examination, Joseph confirmed, *inter alia*, that he knew the identities of the 'sources' referred to in the article. When Joseph was asked to disclose the identities of the F sources referred to in the article, he refused to do so as it was alleged that he had promised the sources that their identities would be kept in confidence. Hence, the plaintiff made the present application pursuant to s. 132 of the Evidence Act 1950, O. 92 r. 4 and O. 35 r. 3 of the Rules of Court 2012 for orders that G Joseph be compelled to disclose the names and particulars of the sources.

Held (dismissing application with costs):

H **(1)** Notwithstanding that at common law there is no absolute rule to protect journalists during trial, the protection is accorded on a case to case basis through a balancing of interest exercise by the court premised on the test of necessity in the interest of justice when deciding whether to order a journalist I to disclose his or her source. (para 44)

(2) The approach to be adopted when a journalist is asked in the course of the trial for his source of information is: (a) there is a residual discretion in the court in that while the journalist has no privilege entitling him as of right to refuse to disclose the source, the interrogator has no absolute right to require such disclosure; (b) the test to determine whether disclosure of the source by the reporter is permitted is whether it is relevant and necessary in this sense, that it is a question that ought to be answered to enable proper investigation to be made; (c) what is 'necessary' is taken to mean the question is one the answer to which will serve a useful purpose in relation to the proceedings at hand; (d) over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer. (para 51)

(3) On the present facts, the disclosure of the sources was relevant and necessary. However, in the circumstances of this case, more harm than good would result from compelling a disclosure. The instant case did not concern breaches of security issues. Hence, it would be more in the public interest for the court not to order Joseph as a journalist to disclose the sources. (para 58)

Case(s) referred to:

Attorney-General v. Clough [1963] 1 QB 773 ***(dist)***

Attorney-General v. Mulholland, Attorney-General v. Foster [1963] 2 QB 477 ***(dist)***

Bank Bumiputra Malaysiaberhad Cawangan Johor Bahru v. Cheong Yoke Choy; Malaysian Central Depository Sdn Bhd (Intervener) [2000] 7 CLJ 157 HC ***(refd)***

British Steel Corpn v. Granada Television Ltd [1981] 1 All ER 417 ***(refd)***

Broadcasting Corporation of New Zealand v. Alex Harvey Industries Ltd [1980] 1 NZLR 163 ***(refd)***

Choy Ching Wan v. Land Development Specialist Sdn Bhd & Anor [2007] 7 CLJ 393 HC ***(refd)***

Ghouse Haji Kader Mustan v. Rex [1946] 1 LNS 47 ***(refd)***

Hennessy v. Wright (1888) 24 QBD 445 ***(refd)***

Hope v. Brash And Another [1897] 2 QB 188 ***(refd)***

John Fairfax & Sons Limited & Anor v. Cojuangco [1988] 165 CLR 346 ***(refd)***

McGuinness v. The Attorney-General of Victoria [1940] 63 CLR 73 ***(dist)***

Overseas-Chinese Banking Corporation Ltd v. Norman Wright & Ors [1989] 1 LNS 53 HC ***(refd)***
Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan [1979] 1 LNS 66 FC ***(refd)***
Plymouth Mutual Co-Operative And Industrial Society, Limited v. Traders' Publishing Association, Limited [1906] 1 KB 403 ***(refd)***
Poh Siew Cheng v. American International Assurance Co Ltd [2005] 1 LNS 252 HC ***(refd)***
Reid v. Telegram Publishing Co Ltd And Drea [1961] 28 DLR (2d) 6 ***(refd)***
Secretary of State for Defence and Another v. Guardian Newspapers Ltd [1984] 3 All ER 601 ***(refd)***
Sham John v. Eastweek Publisher Ltd [1995] 2 LRC 744 ***(refd)***
Television Broadcasts Ltd & Ors v. Mandarin Video Holdings Sdn Bhd [1983] 1 LNS 32 HC ***(refd)***
The Attorney General of HongKong v. Zauyah Wan Chik & Ors & Another Appeal [1995] 3 CLJ 35 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 118, 126, 132
Rules of Court 2012, O. 35 r. 3, O. 92 r. 4

Tribunals of Inquiry (Evidence) Act 1921 [UK], s. 1(2)(b)
Contempt of Courts Act 1981 [UK], s. 10

Other source(s) referred to:
Cyrus V Das, *The Legal Protection of Journalists' Sources*, [2002] 4 MLJ cxlv

For the plaintiff - Prem Ramachandran; M/s Kumar Partnership
For the defendant - Chan Tse Yuen; M/s Chan Tse Yuen & Co
For Joseph Sipalan - Bhag Singh; M/s Bhag Sulaiman & Co

Reported by Amutha Suppayah

JUDGMENT

Lau Bee Lan J:

[1] *Vide* an application (encl. 35) made pursuant to s. 132 of the Evidence Act 1950, O. 92 r. 4 and O. 35 r. 3 of the Rules of Court 2012 ("the ROC"), the plaintiff sought the following orders:

(1) that Mr. Joseph Sipalan of Star Publications (Malaysia) Bhd ("Joseph") be compelled to disclose the names and particulars of the 'sources' referred to in paragraphs 2, 3, 5,

14 and 16 of the article ("the Sources") entitled 'Chua and Tiong in Cahoots' published on 6.9.2009 in the Sunday Times of which Joseph was the author;

(2) that the disclosure be made in writing and served on the solicitors for the Plaintiff within seven (7) days from the date of this Order or within such a time as this Honourable Court deems fit; and

(3) that the trial of this suit be stayed pending the disposal of this application and disclosure by Mr Joseph pursuant to prayer 1 and 2 above.

Background facts

[2] In this suit, the plaintiff's claim is against the defendant for defamatory statements which were published in the Sunday Times on 6 September 2009 ("the Article"). The words and statements in the Article have been attributed to the defendant.

[3] In para. 6 of the statement of claim, the plaintiff pleaded that "the fourth defendant is the person to whom the defamatory statements and words in the article have been attributed to by the third defendant". The fourth defendant referred to therein is the present defendant, Datuk Seri Ong Tee Keat and the third defendant is Joseph.

[4] In para. 7 of the statement of claim, the plaintiff has set out the Article which begins with the paragraph "Datuk Seri Ong Tee Keat has accused his rival, Datuk Seri Chua Soi Lek, of conspiring with Kuala Dimensi chief executive officer Datuk Seri Tiong King Sing to bring him down". It is the plaintiff's case that the Article then goes on to state that the plaintiff is guilty of a criminal conspiracy, bribery and corruption based on the plain and ordinary meaning of the words in the Article as pleaded in para. 8 of the statement of claim.

[5] In para. 12 of the statement of defence, the defendant denied making the statements complained of in the Article and even if the court finds the statements were in fact made by the defendant, the defendant says he is entitled to rely on the defence of qualified privilege. However at the commencement of the trial, the defendant confirmed that he does not intend to rely on the defence of qualified privilege.

[6] Therefore the two issues for determination at the trial are:

(i) whether or not these statements are defamatory of the plaintiff; and

(ii) whether the statements in the Article are attributable to the defendant.

[7] The plaintiff subpoenaed Joseph the author of the Article to testify before the court on 30 January 2013 and he was informed of the nature of the evidence required of him *vide* the plaintiff's solicitor's letter dated 25 January 2013 (exh. TKS-1 in the affidavit of the plaintiff affirmed on 15 February 2013 (encl. 34)).

[8] During the course of his examination, Joseph confirmed, *inter alia*, that:

5.1 he was the author of the article that came to be published in the Sunday Times on 6.9.2009 entitled 'Chua and Tiong in Cahoots?';

5.2 he knew the identities of the Sources referred to in paragraphs 2, 3, 5, 14 and 16 of the Article;

5.3 the Sources were made up of 7 to 8 persons, of which, 2 or 3 were from Kuala Lumpur and Selangor, 3 were from Johor and 1 from Penang;

5.4 the Sources were all members of the Malaysian Chinese Association ("MCA"); and

5.5 he knew the identity of the senior grassroots leader mentioned in paragraph 5 of the Article who was a very senior member of MCA and had been serving the party since the late 1960's.

[9] Joseph was then asked to disclose the identities of the sources referred to in the Article but he refused on the ground he had promised the sources that their identities will be kept in confidence.

[10] In view of the penal consequences that would attach if he refused to make the necessary disclosure, Joseph was given an option by the court to decide whether he would prefer to obtain independent legal advice before making the final decision. Joseph elected to seek independent legal advice.

[11] The court then directed Joseph to communicate his final decision to the plaintiff's solicitors within seven days after receipt of the letter from the plaintiff's letter on disclosure. The plaintiff's solicitors issued and delivered a letter to Joseph dated 31 January 2013 requesting him to revert with his decision on disclosure within seven days, being on or before 7 February 2013 (exh. TKS-2 in the affidavit of the plaintiff affirmed on 15 February 2013).

[12] *Vide* a letter dated 7 February 2013 from his solicitors, Messrs Bhag Sulaiman & Co, Joseph has taken the position that he will only inform parties of his decision on disclosure on the day of trial, being on 20 February 2013 and that he will not be responding to the plaintiff's solicitor's letter dated 31 January 2013 within seven days, as directed.

[13] On 20 February 2013, Joseph made his final decision not to disclose the identities of the sources. Consequently, parties agreed by consent that the trial of this action will be stayed pending the disposal of the said application.

Plaintiff's Contentions

[14] The plaintiff submits Joseph is compelled to disclose the sources. Identities of the sources are relevant because these are the people that have been quoted in the Article. This goes directly to the issue of whether or not the defendant made the statements complained of; it is relevant not only in proving the plaintiff's claim but also to disprove the defence.

[15] Joseph is a competent witness pursuant to s. 118 of the Evidence Act 1950. By virtue of his competency, Joseph is compellable - *Ghouse Haji Kader Mustan v. Rex* [1946] 1 LNS 47; [1946] MLJ 36 at p. 37 left column; *Choy Ching Wan v. Land Development Specialist Sdn Bhd & Anor* [2007] 7 CLJ 393; [2008] 7 MLJ 96 at p. 125 para. 43 D-E; s. 132 - *The Attorney General of HongKong v. Zauyah Wan Chik & Ors & Another Appeal* [1995] 3 CLJ 35 at p. 37 Held 1; *Poh Siew Cheng v. American International Assurance Co Ltd* [2005] 1 LNS 252; [2006] 6 MLJ 57 at p. 74 at para. 29.

[16] A witness can only be compelled whilst he is in the witness box - *Television Broadcasts Ltd & Ors v. Mandarin Video Holdings Sdn Bhd* [1983] 1 LNS 32; [1983] 2 MLJ 346 at pp. 355, 356, 357, 358.

[17] Since Joseph is competent, Joseph is not permitted in law to refuse disclosure on grounds of confidence - *The Attorney General of HongKong v. Zauyah Wan Chik & Ors & Another Appeal* (*supra*) at p. 36 para. 4; *Bank Bumiputra Malaysiaberhad Cawangan Johor Bahru v. Cheong Yoke Choy; Malaysian Central Depository Sdn Bhd (Intervener)* [2000] 7 CLJ 157; [2000] 7 MLJ 323 at p. 361, following *The Attorney General of HongKong v. Zauyah Wan Chik & Ors & Another Appeal* (*supra*).

[18] The newspaper rule provides that in defamation actions, a defendant who is a newspaper publisher or editor should not be compelled in interlocutory proceedings to disclose the name of the writer of the article or the source of information on which the article is based. The plaintiff cites *British Steel Corpn v. Granada Television Ltd* [1981] 1 All ER 417; [1980] 3 WLR 774 (English C/A) at p. 476); and *The Legal Protection of Journalists' Sources* [2002] 4 MLJ cxlv by Cyrus V Das ("CV Das' article").

[19] The plaintiff submits that the newspaper rule has no place in Malaysian jurisprudence. Even if it is to apply, in this instant case, it falls outside the scope of the newspaper rule. The newspaper rule has no application where a reporter has been called as a witness to testify and refuses to answer relevant questions asked after having taken his oath.

Joseph's Contentions

[20] Section 132 of the Evidence Act 1950 is subject to qualification:

(i) the question must be relevant to the matter in issue; and

(ii) it only seeks to grant a witness immunity against arrest or prosecution if the witness is compelled to answer a question which will incriminate or may tend to directly or indirectly criminate him.

[21] It is not stated that s. 132 applies without qualification as long as s. 126 of the Evidence Act 1950 (professional communications between solicitor and client) is relied upon. Subject to what is specifically allowed and specifically compelled, the court retains a residual jurisdiction for the purpose of doing justice and advancing public interest.

[22] Apart from the question of relevance and necessity, there are other considerations impossible to define in advance but arise out of an infinite variety of facts and circumstances which a court encounters which may lead a judge to conclude that more harm than good would result from compelling disclosure or punishing a refusal to answer. Counsel for plaintiff does not have an absolute right to seek disclosure following the *dictum* of Donovan LJ in *Attorney-General v. Mulholland, Attorney-General v. Foster* [1963] 2 QB 477 at p. 492.

[23] On the issue of relevancy, basically, Joseph submits that any disclosure would not help to make out the plaintiff's case against the defendant based on the pleadings; the questions are irrelevant and will serve no useful purpose nor is it necessary to the proceedings at hand.

[24] On the issue of there being other considerations which the court has to contend with being referred to by Donovan LJ in *Mulholland*'s case (*supra*), the following cases were cited on Joseph's behalf: *Hope v. Brash And Another* [1897] 2 QB 188; *Hennessy v. Wright* (1888) 24 QBD 445; *Plymouth Mutual Co-Operative And Industrial Society, Limited v. Traders' Publishing Association, Limited* [1906] 1 KB 403 at p. 416.

[25] Learned counsel for Joseph also cited the cases from the jurisdictions of Australia, New Zealand and Canada namely, *McGuinness v. The Attorney-General of Victoria* [1940] 63 CLR 73, *Broadcasting Corporation of New Zealand v. Alex Harvey Industries Ltd* [1980] 1 NZLR 163 and *Reid v. Telegram Publishing Co Ltd And Drea* [1961] 28 DLR (2d) 6 where the rule of practice of non disclosure of sources of information is followed.

[26] Learned counsel for Joseph further submits the factors for the court to consider in exercising its discretion to decline compelling disclosure include a balancing of interest of public policy, public interest in upholding the administration of justice involving bringing of wrongdoers before the court and in upholding the free flow of information and not merely the narrow concept of confidentiality. Amongst the cases cited are *Secretary of State for Defence and Another v. Guardian Newspapers Ltd* [1984] 3 All ER 601 (HL) (interlocutory action against defendant for return of document); *John Fairfax & Sons Limited & Anor v. Cojuangco* [1988] 165 CLR 346 (HC Australia) (preliminary discovery

seeking the identity of sources of information); *Sham John v. Eastweek Publisher Ltd* [1995] 2 LRC 744 (CA Hong Kong) at p. 755g-i (a case in the context of a discovery application).

Defendant's Contentions

[27] The defendant was originally fourth defendant before the plaintiff dropped his claims against the first defendant (publisher of The NST), second defendant (group editor of first defendant) and third defendant, Joseph (writer of the Article) before they filed their defence.

[28] Essentially the defendant contends the plaintiff's application should be dismissed for reasons of (i) it is an abuse of process of court; (ii) it is a fishing expedition which should not be entertained; (iii) the oath taken by Joseph does not require him to tell all but that the evidence which he gives "shall be the truth and nothing but the truth" and (iv) the court would not grant an order which is futile to the applicant.

Findings Of The Court

[29] It will be observed that in defamation actions the rule of practice not to compel disclosure of the source of information is normally in the context of either a discovery application or an application for interrogatories. However it will also be observed that there is an extension of that rule of practice even in trial cases under certain circumstances as can be seen in *Mulholland*'s case (*supra*), *McGuinness*'s case (*supra*) and *Attorney-General v. Clough* [1963] 1 QB 773 and other trial cases which I will address later.

[30] *Hope*'s case (*supra*) arose from an appeal from an order made by a judge in chambers for inspection of a document in an action for libel against the proprietors of a newspaper where the libel did not mention the plaintiff by name. The defendants who had admitted the publication of the libel and pleaded an apology and payment into court, stated in the affidavit of documents made by them that they had in their possession a manuscript which they objected to produce on the ground that it was the original contribution to them, and that which was published by them in their defence. At p. 191 the Court of Appeal held the question is whether under these circumstances the plaintiff ought to be allowed to inspect the manuscript. Lord Esher referred to

Hennessy's case (*supra*) and opined the same question arose there, whether the defendant in an action for libel published in a newspaper ought to be forced to disclose who it was that supplied him with the materials for the libel which had been published. Lord Esher MR at p. 191 stated:

> ... The general practice of the judges of the Common Law Courts had been for a long series of years not to order inspection in such a case, or to force the defendant to disclose who gave the information on which the libel was published, accepted that practice as binding upon him (Lindley LJ in *Hennessy*'s case).

AL Smith LJ held the same opinion but at p. 192 added "I do not say that the rule so laid down is one which can never be departed from, but there must be something exceptional to take a case out of it."

[31] *Hennessy*'s case (*supra*) is an appeal by plaintiff against the refusal to order a further answer to interrogatories. The action was brought by the plaintiff against the publisher of the The Times, for libel. At p. 449, Lindley LJ stated that the principle that there could be no compulsion to disclose his sources of information as "a tolerably settled practice never to order production."

[32] The case of *Plymouth Mutual Co-Operative And Industrial Society, Limited v. Traders' Publishing Association, Limited* [1906] 1 KB 403 at p. 416 concerns an action for libel against the publishers of a trade periodical. The plaintiffs administered to the defendants interrogatories which the defendants objected. In respect of the seventh interrogator, "From whom did you obtain the information on which you relied in publishing the expressions of opinion", it is observed the Court of Appeal followed *Hope*'s case (*supra*) which in turn followed *Hennessy*'s case (*supra*) at pp. 415-416 and the rule of practice continued in the King's Bench Division to refuse to compel disclosure of the name of the writer of an article or the source of the newspaper information in the absence of special circumstances.

[33] In *Broadcasting Corporation of New Zealand* (*supra*), the plaintiff companies sued the Broadcasting Corporation for, *inter alia*, defamation and slander of goods. The action arose from a programme televised criticising the quality of certain type of roofing tile manufactured and distributed by the plaintiffs. An affidavit of

documents was filed for the Broadcasting Corporation where reference was made to material said to "relate to the defendant's sources of information" in preparing the broadcast. The plaintiffs sought for an order that a further and better affidavit be filed or that the Broadcasting Corporation produce the documents for inspection upon the latter declining to produce a group of documents. The High Court ordered that the documents be made available for inspection. The Broadcasting Corporation appealed. The Court of Appeal held at p. 166 line 21-27:

> As for its underlying purpose I think it must be accepted that it [newspaper rule] is a rule very much concerned with the public interest and the benefit for society in having discussion and evaluation of affairs that is informed. For example, potential sources of information that might usefully be aired in public should not be discouraged by the distracting thought that their identity could quickly be disclosed in proceedings taken against a newspaper which then might never have to face trial itself.

[34] It is pertinent to note the observations made by the Court of Appeal in respect of the newspaper rule:

(i) at p. 166 line 15-21 (per Woodhouse J):

> In order to decide these questions it is necessary to consider first the general purpose of the rule as it has been operated in relation to the newspapers; and to remember that the immunity it offers is applicable only at the interlocutory stage of proceedings. It does not confer any right to withhold information at the trial of an action so that the limited nature of its operation should leave the Court rather more ready than otherwise might seem desirable to have it applied in a way that will be consistent and workable and in accord with the logical implications of a rule concerning information and the newspapers.

(ii) at p. 171 line 35-40 (per Richardson J):

> First, it applies only at the pre-trial stage and not to disclosure at the trial itself (see the discussion in *Attorney-General v. Clough* [1963] 1 QB 773; [1963] 1 All ER 420, *Attorney-General v. Mulholland*, and *McGuinness v. Attorney-General of Victoria*).

(iii) at p. 172 line 45-50 (per Richardson J):

> The reasons for the rule are not found simply in the needs of particular litigants. The broader purpose is to encourage the flow of information to the public and thereby facilitate free trade in

> ideas. That flow is dependent on the reporting of matters of public interest to the news media. The rule promotes this end by holding out to news gatherers and contributors of information to the news media the assurance that, unless and until a matter goes to trial and in the setting of the trial itself, identification of the source of the news media's information will not ordinarily be compelled.

[35] The Canadian case of *Reid* (*supra*) relates to a motion to compel re-attendance to answer questions on discovery in a libel action. The articles complained of consist of a series of purported interviews with an informant which were published in issues of a publication published by the defendant company. The main issue is whether the plaintiff is entitled to obtain information as to the identity and name of the informant from whom the reporter obtained his information and whom he purported to quote in the articles complained of. Wells J of the Ontario High Court followed the principle in *Hope* (*supra*) and *Hennessy* (*supra*) and identified four cases in Ontario which followed the same and at p. 6 held:

> It is a rule of practice in Ontario, based on public policy, that in an action of libel against a newspaper reporter and his newspaper in which defences of justification, qualified privilege and fair comment are raised, the Court in its discretion will refuse discovery to the plaintiff of the identity of the reporter's informants or the sources of the information forming the basis of the alleged libel; and especially is this so because no great hardship is suffered by the plaintiff since it will be necessary for defendants to call their informants to prove truth in fact and lack of malice.

[36] It is observed that the case of *Broadcasting Corporation of New Zealand* (*supra*) and *Reid*'s case (*supra*) followed the common law position with regard to disclosure of the source of information by a reporter wherein the immunity is applicable only at the interlocutory stage of proceedings.

[37] In *Mulholland*'s case (*supra*), two journalists, Mulholland ("M") and Foster ("F") appealed against the sentences imposed on them by the trial judge who after hearing the case and a claim of privilege put forward by the journalists found them guilty as if they had been guilty of a contempt of court. The case before the trial judge stems from a tribunal of inquiry set up to inquire into breaches of security in connection with spying offences committed by V, an Admiralty clerk. M had written in a newspaper that "colleagues of his in the Admiralty called V. 'Auntie' to his face."

Another passage in another article was that "a girl typist in the Admiralty office where he worked had decided that no £15-a-week clerk could possibly live the way he did honestly," and the third passage was that "It was the sponsorship of two high ranking officials which led to V avoiding the strictest part of the Admiralty's security vetting." F refused to give the tribunal the source of his information that "V was known to have bought women's clothing in the West End." Both M and F, when giving evidence, refused to answer questions as to the sources of the information on which those statements were founded. The chairman of the tribunal, in pursuance of s. 1(2)(b) of Tribunals of Inquiry (Evidence) Act 1921 certified to the High Court that they had refused to answer the questions to which the tribunal had legally required an answer.

[38] Lord Denning stated (at p. 487) whether the two journalists could legally be required to answer depends on two questions:

> First, was it relevant and necessary in this sense, that it was a question that ought to be answered to enable proper investigation to be made? Secondly, if it was, have the journalists a privilege in point of law to refuse to answer? Under the statute any witness before the tribunal is entitled to the same immunities and privileges as if he were a witness before the High Court.

[39] In *Mulholland*'s case (*supra*) Lord Denning had to consider whether or not Mulholland and Foster, being journalist, could rely on confidentiality when they were in the witness box as a ground to refuse to answer the questions asked of them by the Attorney General. The court found that Mulholland and Foster had to answer the question and disclose their sources. The rationale of the English Court of Appeal at pp. 487-489 with respect to the grounds of refusal in relation to the first question in *Mulholland*'s case (*supra*) are:

> Was the question relevant to the inquiry? Was it one that the journalist ought to answer? It seems to me that if the inquiry was to be as thorough as the circumstances demanded, it was incumbent on Mulholland to disclose to the tribunal the source of his information. The newspapers had made these allegations. If they made them with a due sense of responsibility (as befits a press which enjoys such freedom as ours) then they must have based them on a trustworthy source. Heaven forbid that they should invent them! And if they did get them from a trustworthy source, then the tribunal must be told of it. How otherwise can

the tribunal discover whether the allegations are well founded or not? The tribunal cannot tell unless they see for themselves this trustworthy source, this witness who is the foundation of it all. The tribunal must, therefore, be entitled to ask what was the source from which the information came.

[40] In relation to the second question, Lord Denning stated (at p. 489):

> But then it is said (and this is the second point) that however relevant these questions were and however proper to be answered for the purpose of the inquiry, a journalist has a privilege by law entitling him to refuse to give his sources of information. The journalist puts forward as his justification the pursuit of truth. It is in the public interest, he says, that he should obtain information in confidence and publish it to the world at large, for by so doing he brings to the public notice that which they should know. He can expose wrongdoing and neglect of duty which would otherwise go unremedied. He cannot get this information, he says, unless he keeps the source of it secret. The mouths of his informants will be closed to him if it is known that their identity will be disclosed. So he claims to be entitled to publish all his information without ever being under any obligation, even when directed by the court or a judge, to disclose whence he got it. It seems to me that the journalists put the matter much too high. The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker or the medical man. **None of these is entitled to refuse to answer when directed to by a judge**. Let me not be mistaken. *The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests - to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done or*, in the case of a tribunal such as this, in a proper investigation being made into these serious allegations. **If the judge determines that the journalist must answer, then no privilege will avail him to refuse**.
>
> The courts will not as a rule compel a newspaper in a libel action to disclose before the trial the source of its information. The reason is because, on weighing the considerations involved, the balance is in favour of exempting the newspaper from disclosure.

> The person who is defamed has his remedy against the newspaper and that is enough, without letting him delve round to see who else he can sue.
>
> It seems to me that whenever a case arises when the interests of justice or of the public require that there should be disclosure and the judge so rules, the newspapers must disclose the source of their information; they have no privilege in law to refuse. (emphasis added)

[41] In *McGuinness v. The Attorney-General of Victoria* [1940] 63 CLR 73 at p. 76, the editor of a newspaper wrote and published articles suggesting that certain persons were collecting funds for the purpose of bribing members of the Victorian Parliament to prevent the passing of a Money Lenders Bill and a Milk Board Bill. A Royal Commission was constituted to inquire into the question whether there had been any bribery or attempt to bribe any member of Parliament and if so, what persons were involved. He was called before as a witness and was asked to give the source of certain statements in his paper relating to the subject matter of the inquiry. He refused to answer the question on the grounds, *inter alia*, that the editor of a newspaper or a journalist cannot be compelled to disclose the sources of information confidentially obtained (ground 2) and that the question which he refused to answer did not touch the subject matter of the inquiry and was not material thereto (ground 3). On the second ground of appeal, the High Court of Australia held:

> But although all authority is against the existence of any rule of evidence under which an editor or journalist is protected when called as a witness on the trial of an action from the necessity of deposing to the source of the information contained in his publication or to statements made in confidence to him in the exercise of his calling, yet a special exception is made in favour of publishers, proprietors, and editors of newspapers as defendants in actions of libel from the general rule that discovery by affidavit of documents and answer to interrogatories must be made of all relevant matters. (per Dixon J at p. 104)

Further it held the second ground of excuse failed because:

> In my opinion the existence of the practice and the reasons on which it is based can form no ground for holding that a lawful excuse existed for the appellant's refusal to answer as to his sources of information. Lawful excuse means a reason or excuse

recognized by law as sufficient justification for a failure or refusal to produce documents or answer questions. (per Dixon J at p. 105)

[42] The court acknowledged "the foundation of the rule is the special position of those publishing and conducting newspapers who accept responsibility for and are liable in respect of the matter contained in the journals and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity."

[43] It is observed from *Mulholland*'s case (*supra*) that the balancing of the competing interests which the court needs to weigh is not only in respect of cases on interrogatories (p. 490 read with pp. 481-482 on cases referred thereto in the arguments put forth by QC for Mulholland) but in cases before an inquiry commission/Royal Commission ie, (i) Parnell Inquiry Commission (p. 490), (ii) *O'Brennan v. Tully* - appears to be a hearing (p. 491), and (iii) *McGuinness v. Attorney-General of Victoria* (p. 491), where the question of whether a journalist was privileged or not was fully argued and considered by the High Court of Australia and it was unanimously held there that there was no such privilege.

[44] The plaintiff submits there is no "special rule" or "special privilege" that extends to journalists and members of the media. With respect I find this statement is not altogether correct. Notwithstanding that at common law there is no absolute rule to protect journalists during trial, but the protection is accorded on a case to case basis through a balancing of interest exercise by the court premised on the test of necessity in the interest of justice when deciding whether to order a journalist to disclose his or her source (see the *dicta* of Lord Denning on the judicial balancing exercise in *Mulholland*'s case (*supra*) at para. 22.3 above referred to also in CV Das' article).

[45] In fact in 1981 when the UK Contempt of Courts Act was enacted, s. 10 was inserted to define the circumstances when disclosure could be ordered, namely, it must be established to the satisfaction of the court that disclosure is necessary (i) in the interests of justice, (ii) national security, or (iii) the prevention of disorder or crime. In relation to the first category of disclosure, Dr CV Dass stated that "The test of 'necessary in the interest of justice' is an embodiment of the common law rule, and would still require the courts to do the balancing."

[46] The case of *Attorney-General v. Clough* [1963] 1 QB 773 concerns a motion to inquire into an offence under s. 1(2)(b) of the Tribunals of Inquiry (Evidence) Act 1921 committed by C, a journalist in refusing to answer a question to which the tribunal legally required an answer and for leave to issue a writ of attachment. This motion arose from an inquiry of a tribunal established under Act of 1921 to inquire into breaches of security in connection with spying offences committed by V, an Admirality clerk. The day following V's conviction, C, had written in a newspaper that V's spying led to Russian trawler spying fleets turning up in the area of certain sea exercises.

[47] Lord Parker CJ in the course of his judgment said that *McGuinness*'s case (*supra*) is persuasive authority and at p. 792 opined:

> In those circumstances I have without the slightest hesitation come to the conclusion that in regard to the press, the law has not developed and crystallised the confidential relationship in which they stand to an informant into one of the classes of privilege known to the law. As I have said, **it still**, as I conceive it, *would remain open to this court to say in the special circumstances of any particular case that public policy did demand that the journalist should be immune, and I therefore ask myself whether, in the circumstances of the present case, it is necessary from the point of view of public policy that I should recognise the claim to immunity which is raised.* (emphasis added)

[48] It is observed that prior to arriving at its decision that C could not claim the immunity, the court carried the balancing exercise of whether the respondent is entitled to the immunity on ground of public policy. At pp. 792-793 Lord Parker CJ stated "... If complaint there be, it is Parliament has said that the public interest of the country demands that an inquiry should be made in a searching way under these terms of reference. That is the public policy so far as this case is concerned, and however much sympathy one has with the respondent [C], it is quite impossible to say that his personal interests (the interests of his profession) should, as a matter of public policy, be preferred to the overriding public policy of Parliament, as evidenced by the setting up of this inquiry."

[49] The case of *British Steel Corpn v. Granada Television Ltd.* [1980] 3 WLR 774 concerns an action for discovery against a television company. Granada appealed from the order of the Court

of Appeal affirming the order of the trial judge requiring them to disclose to the solicitors of the British Steel Corporation ('BSC') the names of all persons responsible for supplying them without the consent of B.S.C. with confidential documents being the property of BSC or with copies thereof. The Court of Appeal upheld the decision of the trial judge and decided in favour of disclosure of the source. At p. 809 Templeman LJ (CA) referred to the cases of *Clough* (*supra*), *Mulholland* (*supra*) and at p. 810 stated:

> These authorities also support Mr. Irvine's submission that there is a public interest in upholding the claim of the media to immunity from disclosing their sources but the authorities also establish that the immunity is not absolute and must be weighed against the interests of the community that justice shall not be denied.

[50] The House of Lords by a majority decision dismissed the appeal (Lord Salmon dissenting allowing the appeal). Lord Wilberforce also referred to the cases of *Clough*, *Mulholland* and *McGuinness* (pp. 822-823) and at p. 821 stated:

> Thirdly, as to information obtained in confidence, and the legal duty, which may arise, to disclose it to a court of justice, the position is clear. Courts have an inherent wish to respect this confidence, whether it arises between doctor and patient, priest and penitent, banker and customer, between persons giving testimonials to employees, or in other relationships. A relationship of confidence between a journalist and his source is in no different category: nothing in this case involves or will involve any principle that such confidence is not something to be respected. *But in all these cases the court may have to decide, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance*. The only question in this appeal is whether the present is such a case. (emphasis added)

[51] In my humble judgment, the approach to be adopted when a journalist is asked in the course of the trial for his source of information is:

(a) there is a residual discretion in the court in that "while the journalist has no privilege entitling him as of right to refuse to disclose the source, so I think the interrogator has no absolute right to require such disclosure" (per Donovan J at p. 492 in *Mulholland*'s case (*supra*));

A (b) the test to determine whether disclosure of the source by the reporter is permitted is whether it is relevant and necessary in this sense, that it was a question that ought to be answered to enable proper investigation to be made? (per Lord Denning M.R. at p. 487 in *Mulholland*'s case (*supra*));

B (c) what is "necessary" is taken to mean the question is one "the answer to which will serve a useful purpose in relation to the proceedings at hand";

C (d) then over and above these two requirements, "there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer." (per Donovan J at p. 492 in *Mulholland*'s case (*supra*)).

D

[52] The plaintiff submits "that the court does have a limited discretion in this sense, because the court must and will in all circumstances be guided by the test of evidential relevancy". In E the light of what I have stated above, whilst I agree with the plaintiff's submission that the court has a limited discretion whether to order a journalist to disclose the identity of his sources, I cannot agree with the plaintiff's submission that the court is limited solely to the question of relevancy, as to reiterate, in my F humble judgment, the test is the two essential requirements of whether it is relevant and necessary coupled with various other considerations which cannot be defined which requires the judge to weigh as part of the balancing exercise.

G **[53]** In my view the issue of evidential relevancy ties up with the fact that:

(a) Joseph is a competent person to testify pursuant to s. 118 Evidence Act 1950.

H (b) As a competent witness who is summoned (subpoenaed), Joseph is bound to give evidence and to answer all relevant questions unless a section enacts he shall not be compelled to give it (see *Ghouse bin Haji Kader Mastan* (*supra*); s. 132 Evidence Act; and *Zauyah Wan Chik*'s case (*supra*)).

I

[54] Now I shall turn to the question of whether "it is relevant and necessary" in the factual matrix of this case. Upon a perusal of the pleadings and the evidence of Joseph pre-application I agree with the submission of the plaintiff that plaintiff's application is relevant for these reasons.

[55] I adopt what I have stated at paras. 2, 3, 4 and 5 under the heading "background facts". The defendant is referred to or named in paras. 1, 2, 3, 5, 6, 7, 8, 9, 14, 16 and 17 of the Article. Paragraph 11 of the statement of claim pleads that the plaintiff issued a pre-action letter dated 25 September 2009 to the defendant and it adduced in evidence that the defendant responded to the letter and said the Article is not defamatory of the plaintiff and refused to apologise. Further it was pleaded in para. 2 of the reply to the defence that in publishing or causing to be published the Article, the defendant was actuated by express malice as particularised. Therefore the contention of the defendant and Joseph that nowhere in the pleadings is it stated that the defendant made the alleged defamatory statements or the words in the Article is incorrect.

[56] I am mindful that Joseph testified that he knew the identities of the sources and the sources were made of seven or eight persons whom Joseph interviewed over the phone and that Joseph's evidence on this changed slightly when he said:

J: You can begin Mr Prem.

P: Mr Joseph you confirm in Court you call the identities of seven or eight people but you cannot disclose the identities because you are bound to confidence.

JS: Yes.

P: Now you are saying that I cannot remember all that.

J: He said I cannot remember that all now?

P: Yeah he said it now. You identified just now 2 or 3 people are from KL or Selangor.

J: Now I wish to state that I cannot remember all of them.

This contradiction took place after a 15 minutes break requested by the plaintiff counsel to seek instructions from client.

[57] The contention of the defendant and Joseph that apart from a general statement that Joseph must disclose his sources, the plaintiff has not in his affidavit specify what evidence he is expecting from the disclosure of the sources. However the cases cited by the defendant as in *Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan* [1979] 1 LNS 66; [1980] 2 MLJ 19; *Overseas-Chinese Banking Corporation Ltd v. Norman Wright & Ors* [1989] 1 LNS 53; [1989] 3 MLJ 73 deal with an application for interrogatories and is therefore not relevant; whilst the case of *Secretary of State for Defence and Another v. Guardian Newspapers Ltd* [1984] 3 All ER 601 cited by Joseph is also of no assistance on the limited issue pertaining to specificity in affidavits as the House of Lords stated that it is "highly special to this particular case"; "it has no general application save to serve as a warning to those for draft affidavits for use in interlocutory applications for disclosure of sources of classified information affecting national security" (per Lord Diplock at p. 604h-j). Therefore the contention of the defendant and Joseph that the plaintiff's application is a fishing expedition bears no merit. The same goes for the defendant's contention that the plaintiff's application is an abuse of court process.

[58] Having determined that the disclosure of the sources is relevant and necessary, I will now have to consider whether there are other factors which the court has to weigh. In the circumstances of this case I find "that more harm than good would result from compelling a disclosure." Unlike the cases of *Clough*, *Mulholland* and *McGuinness* where the journalist was ordered in the public interest to disclose for security reasons, this instant case does not concern breaches of security issues. Hence in my view it would be more in the public interest for the court not to order Joseph as a journalist to disclose the sources for the following reasons:

(a) as he has given undertaking to preserve confidentiality in relation to the sources of information;

(b) a journalist owes a duty to other journalist not to imperil their future prospects of obtaining information;

(c) unless informants could be confident their identity would not be disclosed there was serious risk that the sources of information would dry up;

(d) if disclosure is made, the journalist may imperil his own position;

(e) to encourage the free flow of information to the extent possible and unless outweighed by concerns of the safety of the community where disclosure is necessary to facilitate proper investigation into any serious allegations *vis-a-vis* the interest of the individual journalist which is not the situation here; and

(f) this action concerns an action in libel where the plaintiff seeks to be compensated in damages which can be met by the defendant if the plaintiff's claim is successful.

[59] For the reasons given, the plaintiff's application (encl. 35) is dismissed with costs of RM15,000 to Joseph and RM5,000 to the defendant to be paid by the plaintiff.